STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 25, 2006
v	No. 259532 Saginaw Circuit Court
TRUMON DONTAE CANNON, Defendant-Appellant.	LC No. 04-024226-FC

Before: Donofrio, P.J., and O'Connell, and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for conspiracy to commit armed robbery, MCL 750.529. The trial court sentenced defendant to 210 to 500 months' imprisonment. Because the prosecution presented sufficient evidence to support defendant's conviction, the trial court did not err when it admitted a taped conversation between a codefendant and a third party, and no error occurred requiring resentencing, we affirm.

This case arises out of defendant's participation in an armed robbery that occurred on January 12, 2004 at a Burger King restaurant in Saginaw, Michigan. The prosecution charged defendant along with codefendants, Larry Hibler and Maurice Mayes.[1]

Defendant first argues that the prosecution presented insufficient evidence for the jury to conclude that defendant was a coconspirator in the alleged armed robbery. Specifically, he contends that the evidence displays nothing more than the mere fact that he was present at the time of the robbery. In reviewing the sufficiency of the evidence in a criminal case, this Court reviews the evidence in the light most favorable to the prosecution, and must determine whether a rational trier of fact could find that the essential elements of the offense(s) were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). It is for the trier of fact to determine the inferences that may fairly be drawn from the evidence and the proper weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646

[1] *People v Hibler*, unpublished opinion per curiam of the Court of Appeals, issued _____ (Docket No. 260107); *People v Mayes*, unpublished opinion per curiam of the Court of Appeals, issued _____ (Docket No. 259184).

NW2d 158 (2002). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

"Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy." MCL 750.157a. "Conspiracy is a specific-intent crime, because it requires both the intent to combine with others and the intent to accomplish the illegal objective." *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). The gist of a conspiracy is the unlawful agreement, and conspiracy is an offense distinct from the substantive crime about which the conspirators agree. *Id.* Direct evidence of an agreement to cooperate is not necessary, nor is it required that a formal agreement be proved. *People v Newsome*, 3 Mich App 541, 553; 143 NW2d 165 (1966). It is sufficient if the "circumstances, acts, and conduct of the parties are such as to show an agreement in fact. Such an agreement may be established by evidence that 'the parties steadily pursue the same object, whether acting separately or together by common or different means, but ever leading to the same unlawful result'." *Id.* (internal citation omitted).

The record evidence displays that defendant entered Burger King first, with Mayes and Hibler immediately following him into the restaurant. Mayes and Hibler entered the bathroom once inside the restaurant. Defendant approached the counter with his face uncovered and carrying a $5 bill. When an employee attempted to assist defendant, he stated that he needed a minute and appeared nervous. Within a few seconds, Mayes and Hibler emerged from the bathroom and proceeded to commit the armed robbery. A security video shows defendant leaning against the counter and displaying no reaction. After Mayes and Hibler hopped over the counter, defendant backed away from the counter, flipped his hood over his head, and began walking back and forth from one side of the restaurant to the other side, looking out the sides. Defendant did not leave during the robbery even though he had ample opportunity to exit the restaurant. All three of the men fled the scene together. See *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999). Police apprehended defendant after locating him running down railroad tracks with one of his armed coconspirators.

Viewing the evidence in the light most favorable to the prosecution, a rational jury could have found that defendant traveled to and entered the Burger King with the intent to assist Mayes and Hibler commit armed robbery. As such, we conclude that the evidence presented by the prosecution, together with all reasonable inferences that could be drawn therefrom, is sufficient to support the jury's conclusion that defendant committed conspiracy to commit armed robbery beyond a reasonable doubt.

Next, defendant contends that the trial court violated his constitutional rights under the Confrontation Clause, US Const, Am VI, when it admitted an inculpatory statement made during a taped jailhouse telephone call from codefendant Hibler to a third party. During the phone call, Hibler implicated himself in the armed robbery of Burger King. Hibler also indicated that he was with more than one other person during the commission of the crime. Defendant argues in particular that absent Hibler's statement, the evidence was overwhelming that there were only two people involved in the robbery and he was not one of them. A trial court's decision on a defendant's challenge to the admissibility of hearsay evidence based upon an alleged deprivation of defendant's right to confrontation is subject to de novo review. *People v Smith*, 243 Mich App 657, 681-682; 625 NW2d 46 (2000).

In *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), the United States Supreme Court held that "a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." *Richardson v Marsh*, 481 US 200, 201-202; 107 S Ct 1702; 95 L Ed 2d 176 (1987). In *Richardson*, the Supreme Court addressed the impact of *Bruton* on the admissibility of a codefendant's statement where "the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial." *Id.* at 202. Under those circumstances, which are not unlike the circumstances in this case, the Supreme Court held that *Bruton* was not a bar to the admissibility of the codefendant's statement:

> There is an important distinction between this case and *Bruton*, which causes it to fall outside the narrow exception we have created. In *Bruton*, the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony).
>
> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s exception to the general rule. [*Id.* at 208 (internal footnotes and citations omitted).]

Where, as here, "the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3)." *People v Poole*, 444 Mich 151, 161; 506 NW2d 505 (1993). Pursuant to the reliability criteria established in *Poole*, *supra* at 165, it was not error for the trial court to allow the jury to hear Hibler's recorded statement, particularly given that the trial court stated that it was admitting the evidence only for the limited purpose of determining Hibler's guilt. And, the trial court specifically instructed the jury not to consider Hibler's statement as substantive evidence against defendant. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Finally, defendant argues that he is entitled to resentencing because the trial court erred in scoring the sentencing guidelines. Specifically, defendant argues that the court erred in scoring ten points for offense variable (OV) 4 and fifteen points for OV 10. A sentencing court has discretion in determining the number of points to be scored under the guidelines provided there is evidence on the record that adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court reviews factual decisions made at sentencing under a "clearly erroneous" standard of review. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). "Scoring decisions under the sentencing guidelines are not clearly erroneous if 'there is *any* evidence in support' of the decision." *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003). If the minimum sentence imposed by the court was within the guidelines range, this Court must affirm and may not remand for resentencing absent an error in the scoring guidelines or absent inaccurate information relied on in determining the defendant's sentence. *People v Babcock*, 469 Mich 247, 261-262; 666 NW2d 231 (2003).

Defendant argues that the trial court abused its discretion in assessing ten points for OV 4 because the record contained no evidence to support the conclusion that the victims suffered psychological injury. OV 4 concerns psychological injury suffered by the victim of a crime. MCL 777.34. OV 4 provides that ten points are to be assessed if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). It also provides for a score of zero if "[n]o serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(b).

In *People v Hicks*, 259 Mich App 518, 534-535; 675 NW2d 599 (2003), this Court held that OV 4 was scored improperly where the record was devoid of any indication that any of the victims of the crime needed psychological treatment or suffered "serious psychological injury requiring professional treatment." Given the evidence in the record below, we conclude that it was error for the trial court to assess points against defendant for OV 4. As in *Hicks*, the scoring of OV 4 in the case at hand was inappropriate because it rested on a finding that was not based on adequate evidence in the record. The victims did not testify that they had suffered psychological harm, nor did any of the victims appear at sentencing or provide impact statements for inclusion in the presentence investigation report. There was simply no evidence supporting the court's finding in this regard. Pursuant to *Hicks*, and on the basis of the record evidence, the trial court should have assessed a score of zero points on this sentencing variable.

Also, according to defendant, the trial court should not have assessed fifteen points for OV 10 because OV 10 is designed to punish offenders who had the "primary purpose of victimization." OV 10 concerns the exploitation of a vulnerable victim and provides that fifteen points are to be assessed if "predatory conduct" was involved in committing the offense. MCL 777.40(1)(a). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Defendant argues that the "primary purpose" of the offending conduct in this case was obtaining money, not the victimization of employees. Defendant reasons that where the "primary purpose" of a crime is financial, "predatory conduct" as defined in the statute could not have occurred.

In *People v Kimble*, 252 Mich App 269, 274-275; 651 NW2d 798 (2002), aff'd 470 Mich 305 (2004), this Court addressed the statutory definition of "predatory conduct" and held that the following factual situation warranted a score of fifteen points:

> Under MCL 777.40(1)(a), the trial court must assign fifteen points to this variable if "predatory conduct was involved." The statute defines predatory conduct as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Here, the record reflects that defendant and his accomplices drove around for an hour, looking for a car to steal so they could remove and sell the wheel rims. The record further indicates that, when defendant and his cohorts saw the victim driving a car with valuable rims, they followed the victim home, watched the victim pull into the driveway, and shot the victim in order to steal the car. Defendant's preoffense behavior in seeking out a victim and following this victim home for the specific purpose of committing a crime against her was clearly predatory within the meaning of the statute. Accordingly, the trial court did not err in assigning fifteen points for OV 10.

The evidence suggests that defendant and his coconspirators selected a time, place, and manner in which to commit this robbery to maximize the vulnerability of the victims and minimize their chances of getting caught. The trial court heard evidence that the offenders planned the crime in advance, parked their car alongside the restaurant in a separate parking lot where they would not be seen, selected defendant to act as the lookout, and waited until the restaurant was devoid of customers so that the employees were alone, in order to facilitate the commission of the offense. Accordingly, defendant's acts satisfied the criteria for predatory conduct within the meaning of the statute. Defendant thus fails to show that the trial court commit clear error in scoring fifteen points against defendant on OV 10.

Although defendant has established a scoring error in the guidelines, the error does not require remand. The statutory sentencing guidelines, as scored by the trial court, called for a minimum sentence range of 126 to 210 months. A proper scoring of zero points on OV 4 would not change defendant's placement on this grid. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Defendant also argues that under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), that the trial court erred in scoring OVs 4 and 10 because these scores did not reflect facts decided by the jury. However, the Michigan Supreme Court has explicitly determined that *Blakely* does not apply to Michigan's indeterminate statutory sentencing scheme. *People v Drohan*, ___ Mich ___, ___; ___ NW2d ___ (2006).

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto